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No. 92-945

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

NORTHWEST AIRLINES, INC.,
Petitioner,
v.
AMERICAN AIRLINES, INC. and
AMR CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a court of appeals may issue a writ of mandamus to correct a district court's denial of a motion to disqualify counsel, when there is no adequate alternative means of effective relief and the right to relief is clear and indisputable.

2. Whether a court of appeals may review the record on mandamus to determine that, on the undisputed facts, the applicable legal and ethical principles require disqualification.

3. Whether the Court of Appeals correctly applied the substantial relationship rule in this case to reverse the District Court's denial of disqualifiation.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

RULES INVOLVED

The local rules of the United States District Court for the Southern District of Texas provide in part as follows:

> The Code of Professional Responsibility adopted by this court is the Code of Professional Responsibility of the State Bar of Texas, as amended from time to time.

S.D. Tex. R. 4B.

The Texas Disciplinary Rules of Professional Conduct, adopted effective January 1, 1990, as amended October 23, 1991, provide in part as follows:

Rule 1.09—Conflict of Interest: Former Client

> (a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
>
> * * * * *
>
> (2) If the representation in reasonable probability will involve a violation of Rule 1.05; [1] or
>
> (3) If it is the same or a substantially related matter.

STATEMENT OF THE CASE

Last June, in an action filed in the Southern District of Texas, petitioner Northwest Airlines, Inc. (hereafter "Northwest") charged respondent American Airlines, Inc. and its parent, respondent AMR Corporation (hereafter collectively "American"), with using predatory pricing to monopolize the national and numerous local and regional markets for airline passenger service, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. The complaint for treble damages alleged that American's conduct will cause major domestic airlines, including Northwest, to lose more than $3.5 billion in annual revenues—$500 million during summer 1992 alone. R-1 ¶¶ 32, 36. Northwest's complaint was consolidated with a virtually identical complaint against American that had been filed a few days earlier by Continental Airlines, Inc. Pet. App. A-2.

Vinson & Elkins (hereafter "VE") was counsel of record for Northwest. Because VE had represented American in connection with several significant antitrust matters in the recent past and had also agreed to

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[1] Rule 1.05 prohibits a lawyer from revealing a client's confidential information, except in certain specified circumstances not pertinent to this case.

represent American in the instant case, American promptly moved to disqualify VE from representing Northwest. Pet. App. A-2 to A-3.

The District Court denied the motion in a brief opinion containing virtually no analysis. Pet. App. B-1 to B-8. It ruled "in summary fashion," *id.* at B-4 n.2, that the "mixup" concerning VE's availability to represent American in this case was brief and that the matters on which VE had previously represented American were only "tangentially related to this litigation." *Id.* at B-2.

American sought immediate mandamus review and, in a detailed and exhaustive opinion by Judge Higginbotham, the Fifth Circuit granted the writ. Pet. App. A.

The Circuit Court recognized that orders denying motions to disqualify counsel are not appealable as of course under 28 U.S.C. § 1291, citing *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), and *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985), but also noted that "a writ of mandamus might be available 'in the exceptional circumstances for which it was designed.'" Pet. App. A-4, quoting *Risjord*, 449 U.S. at 378-79 n.13, and *Richardson-Merrell*, 472 U.S. at 435. The court therefore required American to show that it could not otherwise obtain the relief it sought and that its right to issuance of the writ was clear and indisputable. Pet. App. A-4 to A-5, citing, *inter alia*, *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 309 (1989).[2]

The court determined that "the special circumstances of the present dispute [are] sufficient to place it within the narrow class of cases warranting mandamus review." Pet. App. A-5 to A-6. It ruled that American would suffer

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[2] Accordingly, the court recognized that American would be unable to obtain mandamus if it were challenging only matters that were committed to the District Court's discretion. Pet. App. A-6 to A-7, citing *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (*per curiam*).

"irreparable harm" in the absence of immediate review, and also observed that the parties' arguments presented critical issues concerning the proper interpretation and application of ethical standards on disqualification motions that had importance beyond this immediate lawsuit and on which the Texas bar needed guidance. *Id.*[3]

The Court of Appeals reviewed the record to determine whether American had shown that its right to relief was "clear and indisputable." It ruled, on the undisputed facts and applicable principles of law, that disqualification of VE was required, since VE had previously represented American in several separate matters, at least three of which were antitrust ones "substantially related" to this case. Pet. App. A-37 to A-56. It added that VE's continuing representation would taint the proceedings. As the court stated,

> We believe that disqualification of VE would be appropriate even under the relaxed "actual prejudice" or "taint" standard Northwest urges this court to adopt. . . . [T]he relationship between the matters in which VE has represented American and the instant litigation is so intimate that VE's continued involvement does threaten to compromise the integrity of the present trial.

Id. at A-33. The court emphasized that "VE was privy to many of American's secrets." *Id.* at A-35.

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[3] These included questions about the interplay between local disciplinary rules and federal case law on disqualification motions and whether the newly promulgated Texas Disciplinary Rules altered the traditional "substantial relationship" rule (concerning representations adverse to a former client) that had long been used by the Fifth Circuit and other federal courts. Pet. App. A-8 to A-10, A-19 to A-37. *See* n.9, *infra*. The court held that, while the Texas Disciplinary Rules are a source of governing ethical standards, the decision whether to disqualify counsel in federal court is governed by federal law. Pet. App. A-9 to A-10. Further, the court concluded that the Texas Disciplinary Rules did not change the traditional substantial relationship rule developed in the case law. *Id.* at A-28, A-36 to A-37.

The court carefully avoided resolving any conflicts of evidence, declining for that reason to rule on American's claim that VE should be disqualified for switching sides in this case. Pet. App. A-13 to A-18. The Fifth Circuit questioned no finding of fact by the District Court, only that court's ruling that the matters VE had previously handled for American "were only tangentially related to this litigation." Pet. App. B-2.

The court observed that VE had "represented American in several matters in recent years, earning fees in excess of $676,000[,]" Pet. App. A-37, and analyzed three of these in detail.

1. Fort Bend Litigation.

VE defended American in a state court action (hereafter "Fort Bend" case), in which Continental Airlines, Inc. asserted state law claims previously dismissed in *In re Air Passenger Computer Reservations Sys. Antitrust Litig.*, 694 F. Supp. 1443 (C.D. Cal. 1988), *aff'd sub nom. Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1603 (1992) (hereafter "California CRS" case). The court noted Northwest's concession that the California CRS case—in which Continental and Northwest had both sued American—was substantially related to the instant case. Pet. App. A-38. Concluding that the Fort Bend case was substantially related to the California CRS case, *id.* at A-43, and was therefore also substantially related to this case, the appellate court observed:

> [A] VE partner stated at the time that the California and Fort Bend suits "involve the same parties, the same alleged acts, and the same alleged damages." Another VE lawyer noted that the two suits could be seen as "largely identical[.]"

Pet. App. A-40 to A-41.

As in this case and the California CRS case, the plaintiff in the Fort Bend case charged American with ex-

cluding other carriers from " 'certain air passenger markets.' " Pet. App. A-40. Perhaps most significantly for purposes of the substantial relationship analysis,

> Continental noted that the California district court had cited American President Robert Crandall's alleged 1982 price-fixing solicitation of Braniff as "a textbook example of anticompetitive conduct" in ruling that "Continental could proceed to trial on its claim that American illegally attempted to monopolize the Dallas-Fort Worth airport."

Id. As the Circuit Court observed, Continental's market exclusion allegations and the reference to the alleged price-fixing solicitation led to a strategy meeting between VE and Gibson, Dunn & Crutcher (counsel of record for American in the California CRS case), during which, according to the contemporaneous notes of a VE lawyer, VE participated in developing arguments for excluding the alleged price-fixing solicitation from the Fort Bend case. *Id.* at A-40 to A-42. As the Circuit Court stressed, Northwest's complaint in this case "prominently cites" the very price-fixing solicitation allegation that VE lawyers "were charged with excluding in the Fort Bend case." Pet. App. A-42. *See* R-1 ¶¶ 25, 26. Moreover, Northwest's complaint "prominently featured" Dallas-Fort Worth as an "illustrative example" of the markets American has supposedly monopolized or attempted to monopolize. Pet. App. A-42. *See* R-1 ¶¶ 18-20.

2. System One Case.

VE also defended American in a Houston federal court action (hereafter "System One" case), in which a Continental Airlines affiliate charged American with violating the antitrust laws through a series of exclusionary acts. The plaintiff alleged that American's goal was not only to reap monopoly profits from the sale and use of CRS systems but also to enhance profits from providing air transportation services. Pet. App. A-43. The Circuit Court analyzed in detail the relationship between the

subject matter of the System One case and this case, and noted a substantial overlap both in the overall thrust of the two cases and in specific issues, such as barriers to entry. *Id.* at A-44 to A-48.

Furthermore, as the Fifth Circuit emphasized, VE did not deny that in the course of the System One representation, one of its lawyers had "personally reviewed [internal American] documents relating to marketing strategy and air transportation issues[,]" Pet. App. A-47, matters that are directly at issue in this case.

3. Project Armadillo.

VE also served as antitrust counsellor to American in a proposed acquisition of Continental Airlines, "Project Armadillo." Pet. App. A-49. VE advised American on the likelihood of challenge under the Department of Justice's merger guidelines. *Id.*

As the court below noted, the principal focus was on whether American had "market power" in the relevant markets. The central issue was whether the relevant market was a national one or rather smaller ones involving city pairs and regions. Pet. App. A-49. The court observed that "[t]hese same issues are at the heart of the present case[,]" *id.*, adding that "Northwest recognizes that market definition will be crucial in this case." *Id.* at A-51.[4]

Although the substantial relationship determination was sufficient, without more, to warrant disqualification, Pet. App. A-51, the court added that

> VE was also privy to American's views of the relevant air transportation markets, a related matter that

[4] In the Fifth Circuit, Northwest suggested that VE's analysis of market definition in Project Armadillo was "superficial and limited." Pet. App. A-51 to A-52. The court rejected this transparent attempt to sidestep the substantial relationship issue, noting that "the subject was far more complex, and VE's analysis far more extensive, than Northwest's account suggests." *Id.* at A-52.

> will also be at issue in the present case. American provided VE with materials reflecting AA's position on antitrust issues in prior merger/acquisition cases. Included in these materials were confidential "white papers" filed by American with the Justice Department.

Id. at A-54.

The Circuit Court concluded that "American has succeeded in 'delineat[ing] with specificity the subject matters, issues and causes of action' common to prior and present representations in the manner demanded by our precedents." Pet. App. A-56. Indeed, the court held that disqualification would have been required even under the "taint" standard that Northwest urged upon the Circuit Court. *Id.* at A-33.[5] Accordingly, the court issued the writ.

ARGUMENT

THE DECISION OF THE CIRCUIT COURT WAS CORRECT, CONFLICTS WITH NO DECISION OF THIS COURT OR ANY COURT OF APPEALS, AND DOES NOT WARRANT THIS COURT'S REVIEW.

A. Mandamus is Available in the Exceptional Case to Reverse a District Court's Denial of a Motion to Disqualify Counsel.

The appellate court's decision to grant mandamus was clearly correct and conflicts with no decision of this Court or any court of appeals. When this Court held that the denial of an attorney disqualification motion is not immediately appealable under 28 U.S.C. § 1291, it also recognized the possibility of a writ of mandamus:

> Although there may be situations in which a party will be irreparably damaged if forced to wait until final resolution of the underlying litigation before securing review of an order denying its motion to

[5] *See* n.13, *infra*, explaining Northwest's distortion of the so-called "taint" standard.

> disqualify opposing counsel, it is not necessary, in order to resolve those situations, to create a general rule permitting the appeal of all such orders. . . . Ultimately, if dissatisfied with the result in the District Court and absolutely determined that it will be harmed irreparably, a party may seek to have the question certified for interlocutory appellate review pursuant to 28 U.S.C. § 1292(b), see n.7, *supra*, and, in the exceptional circumstances for which it was designed, a writ of mandamus from the court of appeals might be available.

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 378-79 n.13 (1981). The availability of mandamus was underscored in *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985), in which this Court held that a decision granting disqualification was also not immediately appealable. The Court stated that the inability to pursue an interlocutory appeal under 28 U.S.C. § 1291 "would not necessarily leave the client or the disqualified attorney without a remedy." quoting the *Risjord* footnote. *Id.* at 435.

In keeping with *Risjord* and *Richardson-Merrell*, every court of appeals that has faced a mandamus petition seeking reversal of a disqualification motion ruling has recognized the availability of mandamus, although reserving it for the truly unusual case. This case is one of only five reported decisions in the decade since *Risjord* in which a ruling on a disqualification motion has been corrected by mandamus. *See In re Sandahl*, No. 92-3129, 1992 U.S. LEXIS 31574 (7th Cir. Dec. 2, 1992); *In re Dresser Indus., Inc.*, 972 F.2d 540 (5th Cir. 1992); *Christensen v. United States Dist. Court for the Cent. Dist. of Cal.*, 844 F.2d 694 (9th Cir. 1988); *In re American Cable Publications, Inc.*, 768 F.2d 1194 (10th Cir. 1985).[6]

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[6] Courts of appeals declining to grant mandamus have done so, not because mandamus is never available to reverse rulings on disqualification motions, but because mandamus was not appropriate

The Circuit Court, fully cognizant of the applicable mandamus standards, ruled that "the special circumstances of the present dispute [are] sufficient to place it within that narrow class of cases warranting mandamus review." Pet. App. A-5 to A-6. By no means did the court "undercut" this Court's decisions and "open[] the door to interlocutory review of orders on attorney-disqualification motions virtually on demand." Pet. at 11.

Northwest asserts that the Fifth Circuit "concluded, without any analysis, that American has no adequate alternative means to obtain the relief sought on the grounds that 'the nature and size of this litigation would *seem* to preclude effective review upon final judgment.'" Pet. at 9 (emphasis added by Northwest). But it is clear that the determination of irreparable harm was not reached, as if in a vacuum, on size and complexity alone.[7] The very nature of VE's ethical violation was such that irreparable harm was unavoidable but for mandamus. As the court ruled, the relationship between the several matters in which VE represented American and the instant case was more than "substantial"; it was "intimate." Pet. App. A-33. Moreover, VE's ethical violation in undertaking to represent Northwest in this case was not merely technical.

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in the particular cases. *See, e.g., Lunde v. Helms*, 898 F.2d 1343, 1345 (8th Cir.), *cert. denied*, 111 S. Ct. 249 (1990); *In re Mechem*, 880 F.2d 872, 874-75 (6th Cir. 1989); *In re Bushkin Assocs., Inc.*, 864 F.2d 241, 244-47 (1st Cir. 1989); *In re Ford Motor Co.*, 751 F.2d 274, 276-77 (8th Cir. 1984). *See also Community Broadcasting v. F.C.C.*, 546 F.2d 1022, 1028 (D.C. Cir. 1976).

[7] To be sure, this Court has held in the collateral order context that the mere possibility that a party may incur additional litigation expense is not a sufficient basis for setting aside the finality requirement imposed by Congress. *Richardson-Merrell*, 472 U.S. at 436. This Court has also held, however, that the potential for substantial cost savings can be a relevant factor in determining whether to issue mandamus. *See Ex parte Skinner & Eddy Corp.*, 265 U.S. 86, 96 (1924) (noting that a "useless waste of time and effort" would result if mandamus were not granted).

It was egregious in ways that would have incurably tainted the proceedings. *Id.* at A-6, A-33.

The record shows that in each of three prior representations VE accessed and used a great amount of American's confidential information and litigation strategies. Pet. App. A-33, A-35. *See* pp. 5-8, *supra*. Most egregious of all, VE had participated in privileged strategy sessions about how to exclude the same inflammatory evidence that it highlighted in Northwest's complaint in this case. Inevitably, VE's foreknowledge of American's confidential information and legal strategies would have influenced its interrogation of American's officers and employees, both in depositions and at trial. How could VE have expurged this forbidden knowledge from its consciousness and proceed as if it did not know it? Not only was American being sued by the same law firm that had previously represented it, it was under attack by the very same *individuals* who had represented it and in whom it had confided in the prior, substantially related matters.[8]

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[8] All of the VE lawyers listed as counsel on Northwest's complaint (R-1-19) had worked on one or more of the related prior matters for American. *See* R-4-12 (American's Memorandum of Law in Support of its Motion to Disqualify Northwest's Counsel); R-6 ¶ 14 (*In Camera* Affidavit of Andrew B. Steinberg). For example, Harry Reasoner—VE's lead counsel for Northwest in this case—had himself signed American's answer in the Fort Bend case. R-6 ¶ 15, and Ex. 4(A) thereto, p. 6. In addition, both Reasoner and John Murchison signed nondisclosure agreements to obtain access to highly secret and proprietary information in order to be able to serve as American's antitrust counsel on Project Armadillo, the proposed Continental merger. R-6 ¶ 31, and Exs. 16, 17 thereto. The nature of their work is illustrated by a detailed memorandum from Murchison to Reasoner summarizing conversations with American's in-house counsel, including its General Counsel, on antitrust matters related to the proposed merger. See R-20 ¶ 19a (Supplemental *In Camera* Affidavit of Andrew B. Steinberg), and Ex. 18a thereto.

Accordingly, the District Court's suggestion that VE use a "Chinese wall" to screen certain individuals from this case was inapposite on these facts, in addition to being inconsistent with

American's showing to the Circuit Court therefore went well beyond the mere "hint" of "indelible stamp or taint" that this Court ruled was insufficient to show irreparable harm in *Risjord*, 449 U.S. at 376. American showed that absent mandamus there would be substantial taint that could not be cured by a reversal following final judgment. Even were all of the discovery and trial in this complex and disruptive case repeated by new counsel for Northwest who would be denied access to any of the prior record, by what practical means could Northwest's own witnesses' and in-house counsel's familiarity with their prior testimony and the prior record be purged? It would have been impossible to restore American to its rightful position had VE's ethical violation and participation in the case not been immediately terminated by mandamus. To be sure, the erroneous denial of a disqualification motion rarely results in irreparable harm before final judgment. Nonetheless, given the particulars of the ethical violation here, mandamus was the only effective remedy.

Northwest criticizes the Circuit Court for supporting its decision to issue mandamus with the observation "that this case raised important questions pertaining to the proper interpretation and application of ethical standards in disqualification cases." Pet. at 9. Although Northwest recognizes that this Court "has indicated that mandamus may be warranted when a case presents an important and novel issue of first impression," Pet. at 9, *see Schlagenhauf v. Holder*, 379 U.S. 104, 110-11 (1964), it contends that this case presented no such novel issue. Northwest itself argued to the two lower courts, however, that the newly promulgated Texas Disciplinary Rules changed the traditional "substantial relationship" rule that had long been applied in the Fifth Circuit and other federal courts. *See* n.3 *supra*. Indeed, Northwest's arguments concern-

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Texas law, which forbids such arrangements. *See, e.g.*, Texas Disciplinary Rule 1.09(b); *Petroleum Wholesale, Inc. v. Marshall*, 751 S.W. 2d 295, 300 (Tex. Ct. App. 1988).

ing the new Rules doubtless led the Circuit Court to agree that attorneys throughout Texas "need the benefit of this Court's guidance." Pet. App. A-6. It is in part because the court reaffirmed and applied the traditional substantial relationship rule, however, that there is no occasion for this Court's review.[9]

B. A Court of Appeals May Review the Record on Mandamus to Determine That the Undisputed Facts and Applicable Legal Principles Require Disqualification.

Northwest argues that this Court should grant certiorari because the Circuit Court improperly reviewed disputed fact issues *de novo*. Pet. at 15. However, Northwest points to not a single disputed issue of fact resolved by the Court of Appeals.[10] The court reviewed the applicable

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[9] The substantial relationship rule enjoys wide currency among the federal courts. *See, e.g., National Souvenir Ctr. v. Historic Figures, Inc.*, 728 F.2d 503, 517-18 (D.C. Cir.), *cert. denied*, 469 U.S. 825 (1984); *Kevlik v. Goldstein*, 724 F.2d 844, 850-51 (1st Cir. 1984); *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 570 (2d Cir. 1973); *Richardson v. Hamilton Int'l Corp.*, 469 F.2d 1382, 1385 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *General Elec. Co. v. Valeron Corp.*, 608 F.2d 265, 267 (6th Cir. 1979), *cert. denied*, 445 U.S. 930 (1980); *First Wis. Mortgage Trust v. First Wis. Corp.*, 584 F.2d 201, 213-14 (7th Cir. 1978) (*en banc*); *Arkansas v. Dean Foods Prods. Co.*, 605 F.2d 380, 383-84 (8th Cir. 1979), *overruled on other grounds by In re Multi-Piece Rim Prods. Liab. Litig.*, 612 F.2d 377 (8th Cir. 1980) (*en banc*), *vacated on other grounds sub nom. Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981); *Trone v. Smith*, 621 F.2d 994, 998 (9th Cir. 1980); *Redd v. Shell Oil Co.*, 518 F.2d 311, 315 (10th Cir. 1975); *Cox v. American Cast Iron Pipe Co.*, 847 F.2d 725, 728 (11th Cir. 1988); *Tessier v. Plastic Surgery Specialists, Inc.*, 731 F. Supp. 724, 730 (E.D. Va. 1990).

[10] Rather, the court assiduously avoided resolving any contested underlying factual issues. Thus, the court carefully reviewed the record regarding American's contention that VE should be disqualified for having switched sides in the instant case, concluding that the record presented an unresolved fact issue as to which the District Court made no findings. It therefore declined to rest its decision to disqualify on that basis. It held, however, that there

legal principles *de novo* and disagreed with the District Court's insupportable ruling that the prior matters in which VE had represented American "were only tangentially related to this litigation." Pet. App. at B-2.

It is neither unusual nor controversial for an appellate court to reverse a trial court's judgment, applying appropriate legal and ethical principles to undisputed facts. *See, e.g., In re Sandahl*, No. 92-3129, 1992 U.S. App. LEXIS 31574, at *10 (7th Cir. Dec. 2, 1992) (issuing mandamus to reverse disqualification order, and rejecting argument that counsel knew things from a prior representation giving it an unfair advantage, stating that "[t]here is no evidence of such an abuse, however, nor is the suggestion of one plausible in the circumstances"); *In re Dresser Indus., Inc.*, 972 F.2d 540, 541 (5th Cir. 1992) (issuing mandamus to reverse denial of disqualification motion, noting "[t]he material facts are undisputed").

Nor is there merit in Northwest's suggestion that the Fifth Circuit's decision conflicts with those of other courts of appeals because the court did not use an abuse of discretion standard in reviewing the substantial relationship determination. Pet. at 15-16. We have found no case, and Northwest cites none, in which a court determined that the substantial relationship rule was violated but yet did not disqualify counsel. Notwithstanding any "abuse of discretion" language in the opinions, the application of the substantial relationship rule has not been treated as a discretionary matter. As the Circuit Court stated, Pet. App. A-7, what the courts of appeals actually do is review findings of underlying fact under the clearly erroneous standard, conduct plenary review with respect to the governing legal principles and their application, but defer to the trial court's discretion in making such

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was no need to remand for fact finding because of its determination that it was obliged to disqualify VE on other grounds. Pet. App. A-13 to A-18.

judgment calls as whether counsel can adequately represent the arguably conflicting interests of two different clients. *See, e.g., Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1351 (9th Cir. 1981); *Brennan's, Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 171 & n.3 (5th Cir. 1979). *See also American Roller Co. v. Budinger*, 513 F.2d 982, 935 n.3 (3d Cir. 1975).[11]

C. The Court of Appeals Correctly Applied the Substantial Relationship Rule to Disqualify Counsel on the Facts of this Case.

The Circuit Court properly disqualified VE from representing Northwest against American only after it analyzed three instances in which VE had previously represented American—any one of which would have been a sufficient basis for disqualification—and determined that American would be irreparably harmed absent immediate relief. *See* pp. 3-8, *supra*. This fact-bound ruling does not warrant this Court's review.

Northwest attempts to magnify the significance of this case by contending that it presents the question whether the Fifth Circuit appropriately created a new and unworkable duty of loyalty to former clients as the federal standard for disqualification in former-client cases, in conflict with other decisions in the federal courts. Pet. at 22-27. The case presents no such question. The Circuit Court commented on the duty of loyalty, not as an independent basis for disqualification, but rather as part of the court's analysis of the development of the substantial relationship test. Thus, the Fifth Circuit stated:

> The [Texas Disciplinary] Rules' express establishment of loyalty and confidentiality as the interests

[11] Even when an appellate court purports to apply an abuse of discretion standard in reviewing a substantial relationship determination, its role appears to be the same as described by the Fifth Circuit. *See, e.g., Gas-A-Tron v. Union Oil Co.*, 534 F.2d 1322, 1325 (9th Cir.), *cert. denied*, 429 U.S. 861 (1976).

protected by the substantial relationship test is a return to *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953), where the court held that once it is established that the two representations are substantially related,

> [t]he court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. *Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.*

Pet. App. A-29 (emphasis added by the Fifth Circuit). This acknowledgment that the substantial relationship rule incorporates an element of loyalty is nothing new. *See, e.g., Brennan's Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 172 (5th Cir. 1979) ("A client would feel wronged if an opponent prevailed against him with the aid of an attorney who formerly represented the client in the same matter.").[12]

The principal basis of the substantial relationship disqualification rule is as a prophylactic measure to prevent disclosure of client confidences. As Judge Weinfeld explained in his landmark opinion, *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. at 268-69, courts *presume* that relevant confidences were disclosed to the attorney during the course of a former, substantially related representation. As he reasoned:

> To compel the client to show, in addition to establishing that the subject of the present adverse repre-

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[12] Even one of petitioner's counsel recognizes that the substantial relationship rule is founded in part upon principles of loyalty. *See* Charles W. Wolfram, *Modern Legal Ethics* 368 (1986):

> Although *T.C. Theatre* and the cases that have followed it primarily stress [in discussing the substantial relationship rule] the objective of protecting the confidential information of the former client, the loyalty principle . . . is not without significance as well . . . .

> sentation is related to the former, the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship. For the Court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule.

Id. at 269. This reasoning has been widely accepted. *See, e.g., Kevlik v. Goldstein*, 724 F.2d 844, 850-51 (1st Cir. 1984); *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1266-67 (7th Cir. 1983); *Trone v. Smith*, 621 F.2d 994, 998-99 (9th Cir. 1980); *Arkansas v. Dean Foods Prods. Co.*, 605 F.2d 380, 383-84 (8th Cir. 1979); *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973).[13]

In sum, the Fifth Circuit created no new duty of loyalty and no new rule of disqualification. Rather, it simply applied the long-standing substantial relationship test to a particularly flagrant set of undisputed facts to grant mandamus relief in this complex antitrust case, a matter that does not warrant this Court's review.

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[13] Contrary to the position taken by Northwest, Pet. at 25, the Second Circuit and other courts do not demand some separate showing of "taint" in addition to a violation of the substantial relationship rule as a prerequisite for disqualification. On the contrary, a violation of the substantial relationship rule is by itself held to "taint" the proceedings, because "the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation, for exampie, in violation of Canons 4 and 9 [of the now superseded Code of Professional Responsibility], thus giving his present client an unfair advantage. . . ." *Cheng v. GAF Corp.*, 631 F.2d 1052, 1056 n.4 (2d Cir. 1980), *vacated on other grounds*, 450 U.S. 903 (1981), quoting *Armstrong v. McAlpin*, 625 F.2d 433, 444 (2d Cir. 1980), *vacated on other grounds*, 449 U.S. 1106 (1981), quoting *Board of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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